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No. 85-1722

In The
Supreme Court of the United States
October Term, 1986

EDWARD O'LONE, JAMES UCCI and WILLIAM FAUVER,

Petitioners,

v.

ESTATE OF AHMAD UTHMAN SHABAZZ and SADR-UD-DIN NAFIS MATEEN,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONERS

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SUMMARY OF ARGUMENT

Respondents have apparently misconstrued portions of the factual record as is evidenced by the many factual misstatements in their brief. Moreover, their reliance on *Procunier v. Martinez,* 416 *U.S.* 396 (1974) is misplaced since the Court stated there and in a subsequent case, that the holding did not apply to inmates. *Id.* at 409; *Wolff v. McDonnell,* 418 *U.S.* 539, 575-576 (1974).

Respondents have also tried to limit the controlling cases* by arguing that they involved conduct found to be presumptively dangerous, and the regulations at issue were only time, place and manner limitations. Yet, these arguments are inherently inconsistent with this Court's rationale in each of those cases. The standard advocated by respondents ignores the realities of administering prisons and removes all flexibility in management from the prison officials. Religious claims of prisoners will undoubtedly proliferate under such a standard of review since prison officials are very limited in their ability to determine the validity of a religious practice or the sincerity of the believer.

The reasonable relationship standard with the burdens of proof articulated in *St. Claire v. Cuyler,* 634 *F.*2d 109 (3d Cir. 1980), protect inmates' constitutional rights and provides the needed deference to prison officials' determinations.

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ARGUMENT

1. Respondents have misconstrued or misinterpreted the record on several points. Point II of respondents' argument is based on the premise that Standard 853 requires an inmate to complete a period of time in both gang minimum and full minimum status before he can be released. (R.Br.5**7** citing to J.A. 147). This conclusion is

* *Pell v. Procunier,* 417 *U.S.* 817 (1974); *Jones v. North Carolina Prisoners' Union, Inc.,* 433 *U.S.* 119 (1977); and *Bell v. Wolfish,* 441 *U.S.* 520 (1979).

** "R.Br." refers to respondents' brief; "S.G.Br." will be used to refer to the amicus brief filed by the Solicitor General and "Pa.Br." will be used to refer to the brief submitted by Pennsylvania joined by thirty-one states and the District of Columbia.

simply wrong. No inmate is required to successfully complete time in gang or full minimum prior to release. There is nothing in Standard 853 (J.A. 146-158) to support respondents' contention, not even in the specific sections to which they cite. (J.A. 147). It is a fact that many inmates complete their maximum terms or are paroled without ever reaching the reduced custody levels.

Respondents claim that Standard 853 does not require gang minimum inmates to move outside of the security perimeter in their jobs. (R.Br.7, n. 6). Yet, Standard 853 on its face, mandates that gang minimum inmates "be assigned to activities or jobs which routinely require them to move outside the security of the institution. . . ." (J.A. 147, Pet. App. 48A). Thus, assigning Muslim inmates to a work detail inside of the security perimeter, (as the alternate detail was), contravenes the Standard. Further, respondents' statement that the alternate detail was in existence for eleven months before its discontinuation, is not supported by the record and no citation to the record has been made in their brief. (R. Br.7, n. 6). The evidence showed only that the informal policy of allowing some gang minimum Muslim inmates to stay in on Fridays, was in existence for approximately three weeks. (Tr. 18, 23, 24, 68).*

Respondents contend that the population of the institution did not increase between August 1983 and April 1984. (R.Br.8, n. 6). The uncontroverted testimony was

* Only respondent Mateen testified regarding the existence of the alternate detail, and his only knowledge of its existence was from February 21, 1984 when he was first assigned to work outside until March 12, 1984 when the no return policy went into effect and the alternate detail was eliminated.

that the main facility was designed to house 504 inmates and the Farm was originally designed to accommodate 175 inmates. (Tr. 157). The evidence showed that between August 1983 and April 1984 the population fluctuated. The main unit house no less than 691 during that time (J.A. 134) and as many as 770 (J.A. 132); while the Farm housed between 426 and 492 prisoners during that period. (J.A. 122, J.A. 132).

Similarly, respondents suggest that the number of gang minimum inmates assigned to work outside actually decreased before the new policy was implemented. (R.Br. 8, n. 7). However, the uncontradicted evidence was that the number of inmates assigned to work outside increased from the inception of the outside work program in April 1983. Superintendent O'Lone specifically testified that as the administration gradually eliminated the reasons for inmates returning to the institution, there was a greater number of inmates actually reporting to their work assignments thus permitting fewer numbers of inmates to be assigned to the positions. (Tr. 158).

Finally, it is not true that inmates adhering to religions with Saturday or Sunday services have been treated more favorably than Muslims. Any inmate assigned to a seven day per week job would be subject to a disciplinary charge if he refused to work in order to attend a service. (Tr. 191-192).

2. Although respondents deny the new standard articulated by the circuit court is in practice a least restrictive alternative approach, (R.Br.43-44), they argue that "there is no reason why this Court's general Free Exercise principles should not apply both inside and outside of

the prison walls." (R.Br.49) (citations omitted). Respondents acknowledge (R.Br.21), as they must, that as to free citizens the state can place a limitation on the free exercise of religion only if its limitation is the least restrictive means of achieving a compelling end. *Thomas v. Review Board of the Indiana Employment Security Division,* 450 *U.S.* 707, 718 (1981); *Sherbert v. Werner,* 374 *U.S.* 398, 407 (1963). Placing such an onerous burden of proof on the government in the prison context, as respondents advocate, is not only contrary to every prisoner case decided by this Court, but also shows a total lack of understanding of prison life and the realities of operating a prison.

This Court, has described prison as:

> [a] tightly controlled environment peopled by those who have chosen to violate the criminal law and who have been lawfully incarcerated for doing so. Some are first offenders, but many are recidivists who have repeatedly employed illegal and often very violent means to attain their ends. They may have little regard for the safety of others of their property or for the rules designed to provide an orderly and reasonably safe prison life. [*Wolff v. McDonnell,* 418 *U.S.* 561-62 (1979)].

Yet, prison officials are charged with not merely keeping convicted prisoners isolated from society, but also with rehabilitating them to the extent possible and deterring them from future crime. *Pell v. Procunier,* 417 *U.S.* 817, 822-23 (1974). They must do so in as safe and secure a setting as possible. Chief Justice Burger has opined that prison administration is "one of the most vexing of all state responsibilities." *Jones v. North Carolina Prisoners Labor Union, Inc.,* 433 *U.S.* at 137 (Burger, C.J. con-

curring). And it is for these reasons that "rules far different from those imposed on society at large must prevail within prison walls."* *Id.*

The application of the Third Circuit's standard will create very real practical problems for prison administrators. *See*, Pa. Br. 35-41. Every demand made by prisoners under the guise of the free exercise clause will have to be met, giving rise to a proliferation of such claims. The Fifth Circuit has recently noted the problem of proliferation of specific individual requests in the context of prisoners' demands for special diets consistent with religious beliefs. *Udey v. Kastner*, 805 *F.*2d 1218, 1220-21 (5th Cir. 1986).** Such dietary requests have included or-

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* Respondents also argue that the new standard is merely an application of the test articulated in *Procunier v. Martinez*, 416 *U.S.* 396 (1974) (R.Br.36). There, this Court held that prison mail censorship is justified only if the regulation furthers a "substantial governmental interest unrelated to the suppression of expression" and the limitation on free speech rights is no greater than necessary. *Id.* at 413. However, the *Martinez* standard has no application to the present case. The Court in *Martinez* expressly declined to rule on the extent of prisoners' First Amendment rights: "In our view this inquiry [the extent to which prisoners may claim First Amendment freedoms] is unnecessary. . . . [W]e have no occasion to consider the extent to which an individual's right to free speech survives incarceration. . . ." *Id.* at 408. Thereafter, this Court explained: "While First Amendment rights of correspondents with prisoners may protect against the censoring of inmate mail, when not necessary to protect legitimate governmental interest, * * * this Court has not yet recognized First Amendment rights of prisoners in this context." *Wolff v. McDonnell*, 418 *U.S.* at 575-576. (citation of *Martinez* omitted).

** In that case, the court of appeals had previously concluded that the inmate's request was based on sincerely held religious beliefs. *Udey v. Kastner*, 644 *F. Supp.* 1441, 1442 (E.D.Tex. 1986).

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ganically grown food washed only in distilled water, (*Id.* at 1219) and steak and wine by followers of the Church of the New Song, (*Theriault v. Silber*, 391 *F. Supp.* 578, 582 (W.D.Tex. 1975) vacated, 547 *F.*2d 1299 (5th Cir. 1977), *cert.* denied, 434 *U.S.* 871) which some courts determined was a religion entitled to First Amendment protection. *Theriault v. Carlson*, 339 *F. Supp.* 375 (N.D.Ga. 1972), rev'd 495 *F.*2d 390 (5th Cir. 1974) and *Remmers v. Brewer*, 361 *F. Supp.* 537 (S.D.Iowa 1973), aff'd 494 *F.*2d 1277 (8th Cir.) *cert.* denied, 419 *U.S.* 1012 (1974). Other requests have included those made by an inmate who followed the Church of Wicca, a religion of witchcraft, (*Dettmer v. Landon*, 799 *F.*2d 929 (4th Cir. 1986), for a white-hooded robe, candles, incense and a small hollow statue. Although not arising in the prison context, some courts have found that the use of peyote in religious services of Native Americans is central to their spiritual practices and therefore, those using it may not be criminally prosecuted. *People v. Woody*, 61 *Cal.*2d 716, 40 *Cal. Rptr.* 69, 394 *P.*2d 813 (1964); *State v. Whittingham*, 19 Ariz. App. 27, 504 *P.*2d 950 (1973), *cert.* denied, 417 *U.S.* 946 (1974).

Respondents suggest that prison officials will not be inundated with requests or at any rate, will be able to

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However, the Fifth Circuit agreed with the district judge that the cost and administrative burden which might be imposed on the state due to the "probable proliferation of claims," constituted "a problem that the state has a good reason to avoid." 805 *F.*2d at 1221. Judgment for the prison officials was thus affirmed. *Id.* However, under the compelling interest—least restrictive alternative analysis advocated by respondents, the inmate's demand would have to be met since the State had not demonstrated actual threats to security prior to denying the request. See discussion in Petitioners' opening brief at 30 and Pa. Br. 28-29.

screen them since the proponents of the free exercise claims "must demonstrate that the underlying beliefs are sincerely held and religious in nature." (R.Br.55). It has been noted, however, that any inquiry into the sincerity of religious beliefs "can be extraordinarily dangerous." L. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 14-11 at 861 (1978). Only the "most minimal inquiry" can be made as to sincerity "given the *widening understanding of what constitutes religion* in our society" since any further inquiry might jeopardize the very rights which the free exercise clause protects.* *Id.* at 860. (Emphasis supplied). Respondents acknowledge the difficulties that result when the courts or prison administrators attempt to determine whether the availability of alternate means of exercising the religious practice justify the regulation at issue. (R.Br.40). Indeed, respondents quoted the observation of one commentator who stressed that judges cannot make legal rights contingent upon their own interpretation of religious doctrine (R.Br.29, n. 19) (citation omitted). Petitioners themselves presented evidence that they,

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* This notion is supported by Supreme Court precedent. In *United States v. Ballard,* 322 *U.S.* 78 (1944), criminal defendants were prosecuted for mail fraud where they had solicited money on the representation that they were divine messengers. The majority limited the scope of inqury as to whether the religious experiences as professed by the defendants had actually occurred:

> The religious views espoused by respondents might seem incredible, if not preposterous to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain. [*Id.* at 90].

as prison officials, are not in a position to challenge the sincerity of inmates' religious beliefs. (Tr. 141).

Thus, in most instances, prison officials must accept an inmate's word as to the sincerity of his beliefs and as to the religious nature of those beliefs. The rejection of the prisoners' contentions as to religious beliefs, leads to litigation of every religious claim made by prisoners,* and the concomitant exposure to compensatory and punitive damages. Under the Third Circuit's new standard, prison officials will rarely be able to meet the burden of showing prior security problems with the religious practice sought to be exercised or be able to challenge either the validity of the purported religion or the sincerity of the inmate's beliefs. The undeniable result is that prison officials will not be able to legally defend regulations which they have deemed necessary for a secure and orderly institution.

Respondents have failed to support their conclusion that the new standard "will not greatly alter officials' flexibility" and that it "does not unduly interfere with prison affairs." (R.Br.55). Their claim that a similar standard in other jurisdictions has caused no disruption to prison administration is unsupported, (R.Br.55), and is contradicted by the fact that two of the states from which the cited cases arose, (Virginia and Florida), have joined as *amici curiae* in the brief filed by Pennsylvania in support of petitioners. Finally, respondents' citation to *Teterud v. Burns,* 522 *F.*2d 357 (8th Cir. 1975) as a jurisdic-

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* *E.g., Dettmer v. Landon,* 799 *F.*2d 929 (4th Cir. 1986), where the court determined that the witchcraft rites sought to be engaged in by the prisoner were part of a valid religion, and the inmate was sincere in his beliefs.

tion which applied the "mutual accommodation" standard is misleading. Subsequent to that case, the Eighth Circuit adopted the reasonable relationship test of *St. Claire v. Cuyler,* 634 *F.*2d 109 (3d Cir. 1980). *See, Otey v. Best,* 680 *F.*2d 1231 (8th Cir. 1982); *Rogers v. Scurr,* 676 *F.*2d 1211 (8th Cir. 1982); *Hill v. Blackwell,* 774 *F.*2d 338 (8th Cir. 1985) (all involving free exercise of religion claims). However, in *Safley v. Turner,* 777 *F.*2d 1307 (8th Cir. 1986), *cert.* granted *sub nom, Turner v. Safley,* 106 *S.Ct.* 2244 (1986), the Eighth Circuit applied a least restrictive alternative test to a rule prohibiting inmate to inmate correspondence.

3. Respondents argue that it is the "nature" or "character" of the right being asserted which must be examined not the extent of the limitation in determining the standard of review to be applied. (R.Br.25, 26). They suggest use of a tripartite standard developed in *Abdul Wali v. Coughlin,* 754 *F.*2d 1015, 1033 (2d Cir. 1985). (R.Br.26). Under the second part of that test, if the conduct sought to be engaged in is "presumptively dangerous," then the prisoners carry the burden of proving that the regulation is not reasonably related to legitimate penological goals. *Id.* The same approach is applied if the regulation prohibits only one of several means of exercising the right. *Id.* Pursuant to the third part of the test, if an activity is not presumptively dangerous, the prison officials bear the burden of proving that there is no less restrictive means of furthering the institutional goal. *Id. See also, Safley v. Turner, supra,* 777 *F.*2d at 1311, 1313.

The inherent problem with such an analysis is that judges must decide whether particular behaviors or activi-

ties are "presumptively dangerous" in a prison setting. This analysis requires courts to assess the relative dangerousness of activities behind prison walls and to apply a different standard of review dependent upon the type of conduct. The fundamental flaw in such an *ad hoc* approach is evident in the way the courts in *Abdul Wali* and *Safley* and respondents in their brief, attempt to distinguish each of the decisions of this Court with an assessment of the relative dangerousness of the particular inmate conduct.* Since some judges will view certain inmate activities differently from others, inconsistent results will occur. Further, because each prison is different in nature, some activities may be dangerous when practiced in some prisons but not in others. Prison officials, when drafting regulations, will have to predict whether the activity affected is considered dangerous enough to warrant deference to their decision. The discrepancy in results can be seen when comparing *Vester v. Rogers,* 795 *F.*2d 1179 (4th Cir. 1986) with *Safley v. Turner, supra.* At issue in both cases were regulations prohibiting inmate to inmate correspondence. The Eighth Circuit applied the third prong of *Abdul Wali,* determining that the conduct was not presumptively dangerous, (*Safley v. Turner, supra,* at 1311, 1313), and found the rule unconstitutional.

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* Respondents cite this Court's opinions in *Hudson v. Palmer,* 468 *U.S.* 517 (1984) upholding searches of prisoners' cells and *Jones, supra,* upholding a ban on prisoner union activity (R.Br. 26), as cases in which a judicial determination was made that the conduct was presumptively dangerous. However, this Court never characterized the conduct as such. Further, several justices in both cases did not view the activities as dangerous or as threats to prison security. *See, Hudson,* 468 *U.S.* at 543, n.5 (Stevens, J. concurring in part and dissenting in part) and *Jones,* 433 *U.S.* at 143-44 (Marshall, J. dissenting).

The Fourth Circuit, however, essentially applied the second prong of the *Abdul Wali* test and upheld the same regulation. Moreover, the "presumptively dangerous" analysis applies only to regulations adopted in response to security concerns. The test ignores the other legitimate penological objectives, such as rehabilitation, identified by this Court in *Pell*, 417 *U.S.* at 822-23.*

Contrary to respondents' assertion, it is not the nature of the right, (*i.e.*, whether it is a fundamental right such as the free exercise of religion, a fundamental but not quite as important right such as freedom of speech, or a "peripheral" right according to respondents' hierarchy), but rather "the nature of a place" which determines the analysis to be applied. *Pell v. Procunier, supra,* at 826 citing *Grayned v. City of Rockford,* 408 *U.S.* 104, 116 (1972); accord, *Jones, supra,* 433 *U.S.* at 126. Thus, this Court applied the reasonable relationship test to uphold

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* As noted by the Solicitor General, the parole of one respondent and the death of the other render moot their claims for injunctive relief but not their claims for damages. S.G. Br. 9 n.7). Further, there is no issue before this Court as to the application of the no-return policy to full minimum inmates at the Farm since neither respondent ever had standing to litigate that issue. *See, Allen v. Wright,* 104 *S.Ct.* 3315, 3324-25 (1984). Although both respondents were prohibited from attending Jumu'ah when they were in gang minimum status at the main unit, Mateen was not prohibited from attending Jumu'ah when he was assigned to full minimum status at the Farm. (Tr.37, Pet. App. 44A). As events subsequently developed, Mateen was paroled on July 17, 1985 without ever being reassigned to an outside job at the Farm. Shabazz, before his death, was never housed at the Farm. The claim that the regulation is unconstitutional as applied to Farm inmates is therefore, moot. It follows that respondents' argument regarding application of the regulation to Farm inmates is unnecessary. (R.Br.51).

regulations where prisoners could not prove the officials' response was exaggerated, not only where fundamental rights were involved (First Amendment freedom of speech and association in *Pell, Jones* and *Wolfish*), but also where rights derived from the due process clause were at issue (*Block v. Rutherford,* 468 *U.S.* 576 (1984); *Hudson v. Palmer,* 468 *U.S.* 517 (1984); *Hewitt v. Helms,* 459 *U.S.* 460 (1983); and *Wolfish, supra*). In each of these cases, this Court noted that the issue before it was whether the regulation was reasonably related to legitimate governmental objectives. In none of those cases did this Court's analysis change based upon the nature of the constitutional guarantee.*

4. In support of their argument that this Court's line of prisoner constitutional rights cases is inapplicable to a First Amendment free exercise claim made by prisoners,

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* Respondents also argue that the no return policy violated their right to equal protection pursuant to the Fourteenth Amendment, since adherents of religions with Saturday or Sunday services have no limitations on their ability to attend. (R. Br. 47 n.33). The Third Circuit did not address this issue. However, this argument ignores the record testimony that inmates assigned to a seven day per week job are required to work during their assigned hours regardless of whether the work interferes with religious holidays or services. (Tr. 112, 114, 191-193). Further, the Constitution requires only that reasonable opportunities be afforded inmates to exercise religious beliefs pursuant to the First and Fourteenth Amendments. *Cruz v. Beto,* 405 *U.S.* 319, 322 n.2 (1972) (*per curiam*). Clearly, various religious groups within a prison need not be treated identically in order to avoid a Fourteenth Amendment violation. *Id.* at 322; *Glasshofer v. Thornburgh,* 514 *F. Supp.* 1242, 1246 (E.D. Pa. 1981), aff'd 688 *F.*2d 821 (3d Cir. 1982). The record evidence here showed (and the district court so found) that the Muslim inmates were afforded more than a reasonable opportunity to practice their religious beliefs. (*See,* petitioners' opening brief at pp. 16-17; Pet. App. 54A-55A.

respondents attempt to distinguish every case except *Procunier v. Martinez.** Their analysis reveals a complete misunderstanding of these cases.

Respondents claim that *Pell, Jones* and *Wolfish,* all of which raised issues of fundamental First Amendment rights, are different because they involved presumptively dangerous activity by prisoners and because the regulations in question were time, place or manner limitations. On the contrary, it is submitted by petitioners that those cases were decided as they were because this Court recognized the importance of deferring to the expertise of prison administrators.

In *Pell,* the California Department of Corrections restricted inmate visitors to family, friends of previous acquaintance, clergy and attorneys. This regulation effectively precluded face-to-face visits between prisoners and members of the media. The Court deferred to the judgment of the prison officials:

> In the judgment of the state corrections officials, this visitation policy will permit inmates to have personal contact with those persons who will aid in their rehabilitation while keeping visitations at a manageable level that will not compromise institutional security. Such considerations are peculiarly within the province and professional expertise of corrections officials and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters. [*Pell v. Procunier, supra,* 417 *U.S.* at 827].

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* Yet, this is the only case in which the decision was based expressly on the rights of free persons—not the right of prisoners. 416 *U.S.* at 408.

Although respondents contend that the "obvious magnitude of the security concerns . . . compelled this Court to uphold" the regulation (R.Br.31-32), this Court's language in *Pell* in no way supports such a contention. To the contrary, the Court recognized that "security and *related administrative problems,* as well as the accepted and legitimate policy objectives of the corrections system itself" required limitations on certain visitations. *Id.* at 826.

Respondents have also failed to distinguish *Jones.* They acknowledge that First Amendment associational rights were directly implicated by the regulation,* and that such rights are necessarily limited by the fact of imprisonment.** (R.Br.32). Respondents' claim that the union activity was presumptively dangerous is neither supported by the language in the opinion or the record before the Court. The union had been functioning for some time before the prison officials banned union solicitation, meetings and bulk mailings, despite the fact that "there was not one scintilla of evidence to suggest" that the union had jeopardized any penological goals.***

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* "That the First Amendment protects the right to associate is by now well established." *Id.* at 140, n.2 (Marshall, J. dissenting) (citations omitted).

** Of course in the case at hand, the religious practice sought to be exercised is a congregate service which necessarily entails association and all of the problems inherent in allowing prisoners to move throughout the prison complex to attend.

*** Just as respondents have argued that religion will actually enhance the rehabilitation of prisoners, so too it was argued in *Jones* that union activity was constructive for prisoners. *Id.* at 145 (J. Marshall dissenting). While respondents cite several sources to support their claim that religion is helpful to the rehabilitation of prisoners, noted authorities have also recog-

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Finally, in *Wolfish,* despite the record which indicated "no untoward experience" (with regard to the smuggling of contraband in books), and no attempt by the officials to implement less restrictive measures, this Court held:

> There is simply no evidence in the record to indicate that MCC officials have exaggerated their response to this security problem and to the *administrative difficulties* posed by the necessity of carefully inspecting each book mailed from unidentified sources. Therefore, the considered judgment of these experts must control in the absence of prohibitions far more sweeping than those involved here. *See, Jones v. North Carolina Prisoners' Labor Union,* 433 *U.S.* at 128; *Pell v. Procunier,* 417 *U.S.* at 827. [*Bell v. Wolfish,* 441 *U.S.* at 551] [Emphasis supplied].

Respondents also argue that *Pell, Jones,* and *Wolfish* are distinguishable since the regulations at issue in those cases were time, place and manner regulations rather than absolute prohibitions. (R.Br.31, 32, 33). But a reading of

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nized the importance of work and training: " . . . the key to every good [prison] system I have ever seen is *work, education,* and *training,* and it is on this score that so many of our prisons in this country have been, and are today, an appalling failure for a civilized people." Burger, *Factories With Fences: The Prison Industries Approach to Correctional Dilemmas,* in PRISONERS AND THE LAW, 21-5 (I. Robbins 1985). This is not to say that Leesburg prison officials are not sensitive to the religious requests of inmates. The record shows that accommodations are made for Muslim inmates whenever sound penological policy permits. But, clearly the determination of which competing rehabilitative concerns will prevail must be made by the prison officials not the prisoners, who, to say the least, have shown poor judgment in the past. Likewise, it is obvious that judgments about the security of the institution must be made by the prison administrators who have the expertise in such matters.

Wolfish suggests that the regulation was upheld as a "rational response" to an identified security concern, a response which the inmates could not prove was exaggerated. 441 *U.S.* at 550-51. That there were alternative means of obtaining reading material was merely an "influenc[ing]" factor. *Id.* at 551. Likewise, in *Pell,* the regulation was sustained out of deference to the considered judgment of the prison officials that security and other administrative concerns warranted limitations on visits. 417 *U.S.* at 826. The existence of other means of communication with the media (*i.e.,* through the mail) was only a "relevant" factor. *Id.* at 823-824. Finally, in *Jones,* while alternatives existed for the prohibition on receipt of bulk mailings, there were no alternatives to union solicitation.

Respondents' analysis ignores the role that the deference principle plays in these cases.* Deference is important, not only because of the acknowledged difficulties in operating correctional institutions, but also because of the problems prison officials have in conveying to the court all of the considerations that form the bases for prison regulations. This additional reason for deference has been described in the context of other First Amendment claims made by prisoners:

> There are other reasons, however, that courts should defer to the decisions of prison administrators. Only the warden and his staff, for example, really know the inner workings and temperament of the institution, and there are evidentiary and practical problems in

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* It has been noted that this Court in *Bell v. Wolfish,* emphasized twelve times the importance of deferring to the informed decisions of prison officials. Kripe and Kirschbaum, *Prisons as Censors* from PRISONERS AND THE LAW, 3-6 (I. Robbins 1985).

conveying that knowledge to a judge. A warden and his staff gather information from many sources: correctional officers overhear conversations in a mess hall or see a group of prisoners shoving each other in a mess-hall line; quarters officers know and converse with virtually all of the inmates; wardens hear from "snitches," who are sometimes the most reliable sources of information about trouble in its embryonic stages. . . . Apart from this general pulse-taking of the institution, the administration knows the climate of smaller areas (such as workplaces, living units, and leisure areas), and keeps track of relationships among groups and among individual inmates.

Prison administrators gather this information and base day-to-day decisions on that part which is reliable, on their experience as corrections workers, and on their understanding of the inmates and the particular institution.

* * *

> These subtle, intangible indicia cannot adequately be conveyed to a judge; it is difficult to articulate them at all. In such a situation, the judge is faced with an insurmountable and unavoidable handicap, simply because he cannot thoroughly consider all of the relevant factors in making a decision. . . . Administrators, charged with the total control of inmates, know that these decisions cannot be made with detachment. By necessity, they need to be made while considering the totality of the situation. It is difficult for a judge to sense this totality when a particular situation is analyzed in the isolation of the courthouse. [Kripe and Kirschbaum, *Prisons as Censors, PRISONERS AND THE LAW*, 3-7 to 3-8 (1985)].

5. The respondents justify the Third Circuit's departure from the burdens of proof and analysis required by this Court on the basis of an unsubstantiated opinion that the *St. Claire* standard does not adequately protect

the rights of prisoners. They fail to realize that under the reasonable relationship standard, courts will be able to address violations of prisoners' constitutional rights since it is the court which must make the ultimate determination of whether a regulation is reasonable. Contrary to respondents' assertion that under the *St. Claire* standard, any restriction on inmates' rights could be justified by the officials on security grounds, it is the court which must determine whether the regulation is reasonably related to legitimate penological objectives. *See, Valentine v. Englehardt*, 474 *F.Supp.* 294, 301 (D.N.J. 1979) ("The final judgment as to what is reasonable or not lies here.").

Respondents' concerns that the reasonable relationship test and the *St. Claire* burdens of proof do not protect the needs of prisoners and that prison officials will "conjure up a potential security interest" to justify any and all regulations (R.Br. 50) are unsupported. All prison officials have an interest in maintaining order and preventing confrontations with inmates. Respondents so note this concern themselves.* There is a natural incentive to accommodate prisoner demands when penological goals are not jeopardized. It is for this reason, as respondents point out, that the Federal Bureau of Prisoners' regulations encourage the accommodation of prisoners' religious practices. (See S.G. Br. 1a-5a: R.Br.3a-7a). So too, the Leesburg officials attempt to accommodate religious be-

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* "(P)etitioners' lack of sensitivity to prisoners' religious rights in the long run will be counterproductive to the interests of security. . . ." (R. Br. 53). Of course, petitioners disagree that prison inmates have a constitutional right to exercise their religious beliefs when to do so will potentially or actually jeopardize legitimate penological objectives.

liefs. However, just as the letter from Charles R. Riggs, Chaplain Director for the Federal Bureau of Prisons (R. Br.1a-2a and R.Br.41) emphasizes, accommodations are made in the absence of threats to institutional security and subject to good order in the prison. Generally, when prison officials deny opportunities to inmates to practice religious beliefs, it is after a determination has been made that the risks involved are too great.

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CONCLUSION

Petitioners respectfully request this Court to vacate the judgment of the Court of Appeals for the Third Circuit and reinstate the judgment of the district court.

Respectfully submitted,

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